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No. 00-1293

In The Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*,

SENATOR JOHN S. MCCAIN
REPRESENTATIVE MICHAEL G. OXLEY
REPRESENTATIVE JAMES C. GREENWOOD,
REPRESENTATIVE THOMAS J. BLILEY, JR. (RET.),

IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Curiae are the principal Congressional sponsors and authors of the *Child Online Protection Act* of 1998 (COPA). Senator John S. McCain was the Chairman of the Senate Committee on Commerce and Representative Tom Bliley (ret.) was the Chairman of the House Committee on Commerce, which authored the Committee REPORT that accompanied H.R. 3783 (H. REPT. No. 105-775). Representatives Michael G. Oxley and James C. Greenwood were the primary sponsors in the House. (Senator Dan Coats (ret.) was the original sponsor of the Act and was an *amicus* below, but has been nominated to be an Ambassador of the United States and cannot join in this brief.) These gentlemen filed a BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* in both the District Court and the Third Circuit below to present their views on the intent of Congress concerning the meaning and applicability of COPA. Your *amici curiae* submit that the decisions below are contrary to this Court's precedent and the legislative intent of the Congress and submit arguments not presented by the parties below and which may not be submitted to this Court. [1]

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record respectively, have granted consent to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Bruce A. Taylor of the National Law Center for Children and Families ("NLC") and no part of the brief was authored by any attorney for a party. No person or entity other than the NLC, *amici curiae*, or their counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The Court of Appeals committed clear error in its refusal to narrowly construe the *Child Online Protection Act*'s definition of "Harmful To Minors," 47 U.S.C. § 231 (e)(6), within a constitutionally valid scope and lend the necessary authoritative construction intended by Congress as a limitation on the test for what is "Obscene For Minors" to a constitutionally valid, non-geographic "adult" *age* community standard, rather than an unconstitutionally territorial *geographic* community standard. *ACLU v. Reno*, 217 F.3d 162, 173-78 (3d Cir. 2000), *reh. denied* (2000).

Congress enacted COPA with specific recognition of this Court's mandate that the application of obscenity-related tests for separating pornography that may be regulated from First Amendment protected speech depends on the medium. *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

The Congressional intent expressed in its REPORT of the House Committee on Commerce, H. REPT. No. 105-775, at 28 (1998) (House REPORT to accompany H.R. 3783, 105th Cong., 2d Sess.), was that COPA was to be adapted to the World Wide Web by using a "new" standard of what the American adult-age community as a whole would find prurient and offensive for minors in the probable recipient age group. The Third Circuit refused to adopt this Congressionally intended customization of the "harmful to minors" test and, by such refusal, interpreted the Act in an unconstitutional fashion. *ACLU*, 217 F.3d at 178. By doing so, that Court, as had the District Court below, failed in its duty to properly construe this federal statute so as to save it for valid application within constitutional boundaries.

For these reasons, this Court should reverse the decision of the Court of Appeals, and remand the cause to the Third Circuit for a narrowing authoritative construction to guide the District Court in the trial on the merits.

ARGUMENT

I. CONGRESS CREATED A NON-GEOGRAPHIC, AMERICAN ADULT AGE STANDARD FOR COPA THAT AVOIDS THE PERCEIVED OVERBREADTH IMPOSED BY THE THIRD CIRCUIT BELOW IN ITS REFUSAL SO TO CONSTRUE THE STATUTE AND ITS MISAPPLICATION OF TERRITORIAL COMMUNITY STANDARDS

These Congressional *amici* submit that this Court should first read the House Committee REPORT that accompanied this Act, which sets out the legislative basis and intent of COPA that should have guided the parties and courts below in avoiding any unconstitutional applications of the Act and allowing COPA to be validly applied to the free samples of pornographic "teaser" pictures displayed to children and adults alike on the front pages of commercial sites on the World Wide Web that regularly sell hard and soft core pornography that is obscene for minors under the modified test for what is "Harmful To Minors" in this Act.

In particular, the Third Circuit below upheld the trial court's preliminary injunction on the sole ground that COPA must use a geographic community standard to determine what is "Harmful To Minors" and then held that such geographic standards would be unconstitutional if applied to the Web and, therefore, COPA was likely unconstitutional, at least as viewed with this perspective. *ACLU, supra*, 217 F.3d at 178. The Court of Appeals refused to adopt the intended limitation provided by Congress to avoid that very constitutional problem. Specifically, the Act created a new *age* standard for COPA, which reflects the views of the American adult community as a whole, that differs from either the geographic or non-specific community standards that have been applied to adult obscenity in land-based

transportation circumstances. As stated in the House REPORT at 28:

> The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

Congress intended COPA to be a narrow statute that would not reach protected speech; the Plaintiffs and courts below interpreted the Act to be so overbroad that it would. Properly construed and interpreted, COPA could and should have been declared inapplicable to the instant Plaintiffs and they would have been subject to none of the perceived prior restraints presumed in the trial court's Findings of Fact. The law could thus have been upheld for proper application to the Web sites already selling pornography that is within the valid scope of what is obscene or Harmful To Minors under COPA, as to which no unconstitutionality exists. As discussed in Part II below, the courts below did not *find* COPA unconstitutional, they *made* it unconstitutional.

COPA adopted the non-geographic, age-based, adult community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test.

This is a reflection of the power of legislatures to do so, as recognized by this Court in upholding non-specific "community standard" instructions in state and federal courts. *See Jenkins v. Georgia*, 418 U.S. 87, 157 (1974), *Hamling v. United States*, 418 U.S. 87, 101-07 (1974), even though trials could occur in various federal districts, as they could under various state laws. It was in *Jenkins*, at 157, that the Court held that courts and juries need not apply any hypothetical geographic standards whatsoever. Congress,

likewise, narrowed COPA to suit the Web by giving its legislative intent to apply a generic "adult" standard.

In this Court's *Erznoznik* and *Pico* cases, and in the Harmful To Minors cases decided by the other federal and state courts discussed in Part III below, the courts have already held that minors may receive sexual materials that are not "harmful" or "obscene for minors" in the legal sense. Sexual information and sexually explicit materials that are not factually and legally Harmful To Minors and Obscene For Minors under the *Millerized-Ginsberg* test may not be proscribed to minors simply because "someone" disapproves of the message, viewpoint, or orientation of the materials.

Like obscenity generally, the terms "harmful to minors" or "obscene for minors" are legal terms of art, subject to the constitutional procedures of the courts, and protected against unconstitutionally overbroad applications or vague interpretations. As stated in *Hamling v. United States*, 418 U.S. 87, 118 (1974):

> The definition of obscenity, however, is not a question of fact, but one of law; the word "obscene," as used in ...[federal law], is not merely a generic or descriptive term, but a legal term of art. ... The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice ....

So it is with the term "harmful to minors" as adopted into federal law by COPA. So it is also that the federal courts are bound to apply this Act in accordance with First Amendment principles and thus protect even those who suffer unfounded fears instilled by propaganda, advocacy, or lack of trust or knowledge in the law. The courts should not accept such hypothetical exaggerations, because laws are not to be so impermissibly applied or expanded, as the Court noted in *New York v. Ferber*, 458 U.S. 747, at 773 (1982).

The body of law and the diligence of the courts are expected to protect and apply these required legal principles, despite the lack of knowledge or confidence that some individuals may have in the law enforcement or judicial system.

The Court of Appeals focused solely on the "'contemporary community standards' aspect of COPA" in "affirming the District Court's ruling on a ground other than that emphasized by the District Court". *ACLU*, 217 F.3d at 174, n. 19. As stated by the Court of Appeals, at 173-74:

> We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.

Although first saying the issue was virtually ignored, the Circuit court later referred to the arguments on this issue by the Government and the Congressional *amici* in their BRIEF OF MEMBERS OF CONGRESS (quoting the BRIEF's statement at p. 16 that: "COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful to Minors test."). *Id.* The Court of Appeals then misread this Court's allowance of local determinations of obscenity in *Miller v. California*, 413 U.S. 15 (1973), as requiring such local geographic standards.

That opinion failed to consider this Court's decision the next year, in *Jenkins v. Georgia*, 418 U.S. at 157 ("We

also agree with ... instructions directing jurors to apply 'community standards' without specifying what 'community.'"), that courts and juries may apply non-specific "community standards" and need not apply any hypothetical geographic standards in making factual findings through the "community" viewpoint of an "average person" (as cited in the Congressional BRIEF at pp. 16-17).

By finding itself hand-cuffed to geographic standards under *Miller*, and presuming that geographic standards would be inherently improper for Web determinations of what would be obscene for minors, the Third Circuit declared that COPA was, therefore, inherently unconstitutional and rejected Congressional intent to apply the Committee REPORT's statutory directive to create a "new harmful to minors definition" that was "crafted in a way to respond to the Supreme Court's concerns" in *Reno v. ACLU*, 521 U.S. 844 (1997). *See* H. REPT. No. 105-775, at 13.

Congress specifically explained its intent to apply a medium-specific, non-geographic standard to the first two prongs of the test for what is "obscene for minors" or "harmful to minors" and the courts below failed in their duty to follow the requirements for federal court review of federal statutes expressed in *Ferber*, 458 U.S. at 769, n. 24 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (context is all important, including the medium involved).

This issue was discussed at pp. 16-17 of the BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* that was filed with the Third Circuit:

> This Court, like the Supreme Court in *Ferber*, should correct the assumption that federal courts can "widen the possibly invalid reach of the statute by

giving an expansive construction" to COPA and apply the clearly binding precedents discussed herein and in the COMMITTEE REPORT.

Courts recognize the need to follow these principles in applying the HTM test to pornographic treatments, rather than to ideas or messages in controversial works, as in the school cases: *Board of Education v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980); *Presidents Council v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test. As stated in the COMMITTEE REPORT at 28:

> The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

Properly construed and applied, HTM laws apply to pornographic materials, not serious or controversial treatments of sex. Serious sex education, AIDS or STD information, disease prevention, sexual politics, news accounts of sexual offenses or legal issues, and political or social treatments of sexual issues cannot be obscene or Harmful To Minors because they have serious literary, artistic, political, or scientific value for minors.[2]

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[2] *I.e.*, the "Starr Report" released by Congress to the press and World Wide Web, as a public document of political significance, would **not** be affected by COPA (or existing state HTM laws),

The established test for Harmful To Minors only affects a minor's access to that which lacks serious literary, artistic, political, or scientific value for the intended and probable age group of the minors to which it is available.

Furthermore, because of limitations in the statutory elements, secondary transmissions ("hot links" to offending sites) would not, standing alone, violate the statute, even if commercial. House REPORT at 25. COPA requires that an offender be the one who knows the character of the matter and then knowingly "makes any communication for commercial purposes...that includes any material that is harmful to minors" under Section 231 (a). The law further limits the maker of the HTM/OFM communication to one who is "engaged in the business" of trying to profit from "such" harmful communications "as a regular course of such person's trade or business" under Section 231 (e)(2). COPA, therefore, only applies to commercial WWW sites that can be proven by the Government to regularly and knowingly sell or attempt to profit from pornographic materials that are obscene or Harmful To Minors. COPA does not apply to private, governmental, news, non-profit, or other sites that cannot be shown to regularly market obscene or HTM pornography. COPA is a valid proscription against a definitive type of pornography, but it would not, as a matter

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since the "Starr Report" is neither "obscene" for adults nor Obscene For Minors. It's not "pandered" to prurient interests and does not describe sexual conduct in a "patently offensive" way. Its grand jury descriptions are clinically graphic, not salaciously lascivious or pruriently pornographic when judged by the "average person" of the law. Finally, such governmental and news information has inherently serious political value, as a matter of law, for everyone, everywhere, any time, minors as well as adults, here and abroad. The NYTimes.com and Amazon.com are free to reprint or sell it at will, as everyone knows, and can post it online without any restrictions, as Congress did.

of law, affect the release nor the commercial or public re-distribution of serious works.

A most important case in the history of harmful to minors laws since *Ginsberg*, especially as a lesson in the need for properly construing such a law as COPA, is *Commonwealth of Virginia v. American Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1988), which clarified and limited the scope of such laws at the request of this Court. The federal courts had found Virginia's display law overbroad and vague, based on presumptions about what would be HTM. *American Booksellers Ass'n v. Strobel*, 617 F.Supp. 699 (E.D. Va. 1985), *aff'd, sub nom American Booksellers v. Com. of Va.*, 792 F.2d 1261 (4th Cir. 1986), amended opinion, 802 F.2d 691 (4th Cir. 1986). Jurisdiction was noted on the appeal, but this Court then proffered two certified questions to the Supreme Court of Virginia, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988):

1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 ..., properly construed, encompass any of the books introduced as plaintiff's exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?

2. What meaning is to be given to the provision of Virginia Code § 18.2-391(a) ... making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

The Virginia Supreme Court replied, 372 S.E.2d at 625: "*The first certified question is answered in the negative. The second certified question is answered in the affirmative.*"

The Virginia Supreme Court interpreted Virginia's "harmful to juveniles" display law in light of *Miller, Ginsberg, Pope, etc.*, as applicable only to "explicit sexual content," "pornographic," or "borderline obscenity" and found that sixteen exhibits would not be "harmful to juveniles" because they contained serious literary, artistic, political, or scientific value "for a legitimate minority of older, normal adolescents". As so construed, Virginia's law was then upheld on remand, *sub nom American Booksellers Ass'n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989).

It is clear, these *amici* submit, that the concerns of the U.S. Supreme Court were in (1) whether the reach of such harmful to minors laws as upheld in *Ginsberg* were still limited to pornographic "adult" materials, rather than to serious or redeeming, if frank, sexual information or treatments; (2) whether the "variable obscenity standard" was variable, not only for minors as a class, but variable as to age groups of minors within that class; and (3) whether possible restrictions on marketing or display of such "harmful" pornography that is "obscene as to minors" are reasonably related to safeguarding children from exposure to such unprotected materials (as to them) by various methods available to businesses in modern commerce.

Just as the highest federal Court asked the highest state Court for its authoritative interpretation and construction of the law under consideration, your Congressional *amici* similarly submit that the courts below, with a corresponding power and duty to interpret and construe this federal law, should have authoritatively read the Child Online Protection Act so as to protect the legitimate rights of those to whom it cannot be applied and to

uphold it as to all others to whom it is facially applicable and who are not challenging the act or who may face the Act only on a fact specific case-by-case basis in the future.

The guidance of historical precedent and limitations recognized in the House REPORT and HEARINGS, should be adopted by this Court and thus avoid any real or substantial overbreadth or vagueness claimed by the Plaintiffs and their *amici* in this matter. This Court would thus guide the lower courts on remand to protect the rights of those before it and all those who are not before it, since both groups will benefit from the limiting focus and clarifying gloss put on the law by an authoritative declaratory judgment in this case.

II. THE COURTS BELOW ERRED IN REFUSING TO NARROWLY CONSTRUE THE ACT SO AS TO BE CONSTITUTIONAL AND, INSTEAD, INTERPRETED THE LAW IN AN OVERBROAD FASHION SO AS TO BE UNCONSTITUTIONAL

The Court of Appeals below made a fundamental error of statutory review in refusing to authoritatively construe the definition of "harmful to minors" in COPA as specified and intended by Congress. *ACLU v. Reno, supra*, 217 F.3d at 178. Doing so would have avoided the potential for overbreadth the courts below presumed if geographic community standards were applied to Web traffic under COPA. The Third Circuit assumed that geographic standards would lead to unconstitutional applications and then noted that Congress intended a non-geographic standard to avoid this, but refused to adopt that saving construction because the court below was of the opinion that "community standards have always been interpreted as a geographic standard without uniformity" and, therefore, declared the test for what is "harmful to minors" to be unconstitutional for the Web. *Id.*

In this way, the courts below did not find COPA unconstitutional, they made it unconstitutional.

Though federal courts cannot authoritatively construe a state statute and, instead, declare them wholly or partially valid, invalid, or severable, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-05 (1985), the rule is appositive for federal statutes, since federal courts are bound to interpret federal laws in a constitutional fashion so as to protect legitimate rights. COPA is readily susceptible to such authoritative constitutional construction. The rule was stated in *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982):

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.

It was recognized in *Ferber, supra*, that First Amendment challenges may be heard to a law that is facially overbroad by one to whom the statute could have been validly applied. The opposite is also true. The courts should not strike a statute on its face as to those to whom it has a legitimate reach when the court can protect the rights of those before it by limiting its reach. By declaring it inapplicable to those to whom it cannot be applied, such narrowing construction will exclude and guide those protected speakers. *Ferber*, at 766-74, discussed the "substantial overbreadth" doctrine and reiterated that facial invalidity is a drastic and narrow exception that must be "carefully tied to the circumstances in which facial invalidation of a statute is truly warranted" and is "strong medicine ... only as a last resort." Plaintiffs were never required to offer proof of any real or substantial overbreadth claimed for this Act and this Court should correct the lower courts' presumed overbreadth by narrowly construing COPA

so as to prevent and forbid any such unconstitutional applications. As noted and held in *Ferber*, at 773-74:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic, would fall prey to the statute. ...Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially overbroad and ... whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." [Emphasis added.]

In the instant case, COPA is explicitly directed at the pornographic core of what is obscene or harmful to minors, not at literary, artistic, political, or scientific treatments of sex and not at materials that are not pandered to prurient interests. In this case, the ACLU argued that the HTM test could be expanded to reach much of the speech traditionally protected from prosecution under existing "harmful to minors" laws, without any evidence, factual basis, or even examples to substantiate such fears of expansive application.

The District Court did not find anything in the record to be Harmful To Minors as defined in COPA, did not find any image, text, or information on any Plaintiff's Website to be subject to COPA, and did not find that COPA would apply to any identifiable utterance of protected speech

presented as evidence in the record. The ACLU Plaintiffs offered no example of any HTM materials in their possession, they identified none on anyone else's sites, and denied that any of them had any pornography, much less pornography that could be "obscene for minors." The basis for the Findings of Fact were mere fears that "some" information of a sexual nature could be offensive to "someone" in another state or prosecuted by "some" prosecutor somewhere.[3]

Especially on the basis of this legally inaccurate and speculative testimony, *amici* submit that this is not a proper record upon which the federal courts should be asked to strike down a federal statute.

This Court, like the Court in *Ferber*, should correct the assumption that federal courts can hypothetically "widen the possibly invalid reach of the statute by giving an expansive construction" to COPA and apply the clearly binding precedents discussed herein and in the House REPORT. Courts are obligated to recognize the need to follow these principles in applying the HTM test to pornographic treatments that are "Obscene For Minors",

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[3] Question: "In your opinion, how would COPA impact the ability of Internet users to browse on the Web for information that is prohibited by COPA?" Answer by Prof. Hoffman: "... I think it would have negative consequences for the flow experience...." Transcript of Jan. 20, 1999, at 75. *See also* Testimony of Mr. Barr for CNET, that he thought COPA would ban a news article about a porn convention, prevent asking a woman's "bra size" or discussing "safe sex on-line". (Tr. Jan. 21 at 48-49, 63-65); Testimony of Mr. Tepper for Sexual Health Network, "Yes, I do" when asked "Do you fear that some people will not believe your site has value to minors?" (Tr. Jan. 21 at 117); Testimony of Mr. Rielly for PlanetOut, as to the "basis of your fear?", said "many people would find just being gay at all, harmful to minors in their definition of it". (Tr. Jan. 21 at 158).

rather than to ideas or messages in controversial works, as in the school cases, such as *Board of Education v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980); and *Presidents Council v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

III. COPA Is An Explicitly Narrow Statute That Applies Only To Pornography That Is Obscene For Minors Or Obscene For Adults And Only For Commercial Sites That Sell Such Pornography On The World Wide Web

Your Congressional *amici* maintain that the *Child Online Protection Act* is a constitutionally valid federal adoption of the traditional protections for minors that have existed for over thirty years in state Harmful To Minors ("HTM") laws. This statute, 47 U.S.C. § 231,[4] would protect the overwhelming majority of minor children in America from the instant and unrestricted access to the free pornographic "teaser" pictures now openly available on the front pages of tens of thousands of commercial porn Websites that sell hard-core and soft-core pornography on the World Wide Web. In light of the dire situation existing since the CDA's indecency provisions were invalidated in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329 (1997), Congress found that COPA would be effective and reasonable in dealing with this tragic feature of the Web. As stated in the House REPORT at 16:

> In light of the *Reno* decision, the Committee has thoughtfully and thoroughly considered a number of ways to help protect children from being exposed

[4] Copy in Appendix hereto.

> to harmful material. Each proposal has merit, but the Committee concludes that H.R. 3873 is currently the most effective, yet least restrictive approach that should be taken given the current state of technology.

Commercial pornography is big business and a major presence on the Web. Tens of thousands of "adult" sites sell pornography. House REPORT at 7. Most openly allow children, as well as adults, to view hard-core and soft-core porn pictures by simply clicking on any link to a pornography company's Web page, even when searching for innocent material such as "teen", "boy", "girl", "toy", "pet", *etc.* *See* House REPORT at 10, citing Testimony of National Law Center for Children and Families. By 1998, "almost 70 percent of the traffic on the Web is adult-oriented material" and exposure to pornography is just as unintentional as it is intended, especially to children. House REPORT at 10. The Committee found that exposing children to pornographic HTM/OFM material does cause harm to children and is a dangerous influence in their development. House REPORT at 11.[5] Other testimony and evidence was provided to the

[5] *I.e.*, the effect on children of flashes of pornographic teaser images is profound: as neurologist Dr. Gary Lynch stated, "an event which lasts half a second within five to ten minutes has produced a structural change that is in some ways as profound as the structural changes one sees in [brain} damage...[and] can...leave a trace that will last for years"; in a study conducted for the Office of Juvenile Justice and Delinquency Prevention of the U.S. Dept. of Justice, Dr. Judith Reisman chronicled the practices of sexualizing children in pornography in *Images of Children, Crime and Violence in Playboy, Penthouse, and Hustler*, www.DrJudithReisman.org; Reisman, *"SoftPorn" Plays Hardball: Its Tragic Effects on Women, Children & the Family* (Huntington House Pub. 1991); and as psychiatrist Dr. Richard Restak noted in

Committee at its HEARING ON LEGISLATIVE PROPOSALS TO PROTECT CHILDREN FROM INAPPROPRIATE MATERIALS ON THE INTERNET, House Commerce Committee (September 11, 1998), and the House REPORT chronicles this and other findings about the serious problem of freely available pornography and the free "teaser" samples of porn pictures that can be viewed, downloaded, and printed by children. House REPORT at 6-12, 16, 20-21.[6]

COPA was specifically designed to require such commercial porn sellers to make a good faith effort, by credit card, credit card number[7], adult access number, *etc.*, to protect visiting children or teenagers from seeing graphic sex pictures on front pages of porn Websites. House REPORT at 6, 11-12. Such sites already take credit cards to allow customers to view thousands of other pornographic pictures, so they have no technological or other reasonable excuse for putting the credit card page ahead of the "teaser" pictures. If they ask for a credit card number or adult PIN, or any other technical device such as a digital signature or an ISP's or a

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his book, *The Mind* (Bantam Books, 1988), p. 283, "Inhibition rather than excitation is the hallmark of the healthy brain."

[6] The District Court noted only the mere existence of "sexually explicit material" on the Web and failed to make findings or discuss Congressional findings of the extent of the problem. *ACLU v. Reno*, 31 F.Supp.2d 473, 484 (E.D. Pa. 1999).

[7] *Amici*'s briefs below discussed the "Luhn Check Algorithm" as a § 231(c)(1)(C) defense technique to check credit card numbers and screen out minors. *Amici* submit that the trial court below could have considered adequate alternatives for compliance, including a virtually free compliance method like the "Luhn Check" (which simply runs a credit card number through a mathematical formula to reject phony numbers, such as a child may try to pass, without checking any bank databases or charging the customer at all) and submit that this Court or the Court of Appeals should direct the District Court to do so on remand.

school's age identifying signal code, then they are not liable under COPA, even if an "enterprising and disobedient" minor does steal his mother's credit card, his father's digital signature, or his older brother's adult PIN number. The Website did all the Act could ask to screen out children and that, alone, "would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages" and porn-images, as recognized by this Court as to the FCC's similar dial-porn protections in *Sable Communications of Cal. v. FCC*, 429 U.S. 115, 130 (1989).

The legislative intent of this Act, stated in the House REPORT, clearly establishes that COPA was intentionally limited in scope to deal only with this problem as it exists on the World Wide Web and only for commercial sellers of pornography that is "obscene" (even for adults) or "harmful to minors" (*i.e.*, "obscene for minors"). It is equally clear from the House REPORT that the Act was not intended to apply to serious or merely controversial treatments of sex or sexual issues that form the complaints of Plaintiffs below.[8]

These Members of Congress respectfully submit that the courts below erred grievously in failing to interpret COPA as narrowly as intended. The lower courts should have excluded COPA's application to Plaintiffs' materials as outside the scope of what is "harmful to minors," as this

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[8] It can't be ignored that the District Court did not find <u>any</u> Plaintiff's material "harmful to minors" or even potentially so. The evidence was that none was considered "HTM," but that Plaintiffs "feared" COPA because they had some material "sexual in nature". 31 F.Supp.2d at 480, 484-86. Importantly, the Government conceded COPA's "definition of 'harmful to minors' material does not apply to any of the material on the plaintiffs' Web sites, and that the statute only targets commercial pornographers, those who distribute harmful to minors material 'as a regular course' of their business." 31 F.Supp.2d at 479.

Court and other federal and state courts have construed that legal test for what is "Obscene For Minors". House REPORT at 12-13.

The technical capability of commercial WWW pornographers to use credit cards and PIN codes was recognized in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2349 (1997), and by the District Court below, 31 F.Supp.2d at 488-91. Congress adopted this Court's pronouncements to deal with this narrow part of the problem of online pornography. House REPORT at 5, 11-13, 26. COPA applies only to the World Wide Web and excludes all other Internet, Usenet, email, BBS, chat, and online services. The Act applies only to commercial sellers of HTM/OFM pornography and excludes all non-commercial, non-profit, educational, governmental, and private communications. House REPORT at 12-14. Finally, COPA employs existing, constitutionally valid definitions of "obscene" and "harmful to minors," limiting its reach to pornography that is not protected speech for juveniles to receive and unprotected when provided or displayed to juveniles by adults. House REPORT at 12-13, 28. Therefore, COPA is an intentionally narrow focus on a "least restrictive means" to control the unrestricted display to minors of legally "harmful" pornographic materials that are Obscene For Minors on pornsite Web pages. House REPORT at 12, 16, 26.

COPA is limited solely to regulating the manner of displaying adult pornography for sale on the Web. COPA does not prohibit adults from obtaining HTM pornography online. COPA requires commercial Websites that are regularly "engaged in the business"[9] of trying to make money from selling HTM/OFM pornography to have visitors

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[9] As that term of art applies to obscenity law, 18 U.S.C. § 1466, as construed and applied in *U.S. v. Skinner*, 25 F.3d 1314, 1318-19 (6th Cir. 1994). House REPORT at 27.

identified as adults before sampling adult materials. Sites are protected by defenses in Section 231(c) when attempting to restrict access "by any other reasonable measures that are feasible under available technology". COPA acts like existing HTM display laws that require vendors of "adult" pornography to put HTM materials out of minors' reach in commercial and public places. Over the past four decades in every state, magazine retailers, video outlets, and "adult" pornshops, have complied with state HTM laws, yet continued to sell such materials to adults while restricting access and display from minors.

COPA separately incorporates both the "*Miller*" test for what is "obscene" for adults, as well as a Web modified legal definition of "harmful to minors", thus making the Act applicable to hard-core pornography that is obscene[10] and soft-core pornography that is "Harmful To Minors" and Obscene For Minors even if not obscene for adults.[11] The HTM test was upheld over thirty years ago as a "variable obscenity" test for pornographic materials that are unprotected for minors in *Ginsberg v. New York*, 390 U.S. 629 (1968), and is now known as the "*Millerized-Ginsberg* Test." *See* House REPORT at 12-13. The obscenity test derives from *Miller v. California*, 413 U.S. 15, at 24-25 (1973), *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977) (the "average person, applying contemporary community standards" would also "judge" patent offensiveness in prong two), and *Pope v. Illinois*, 481 U.S.

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[10] *See also* Taylor, "Hard-Core Pornography: A Proposal For A *Per Se* Rule," 21 U. MICH. J.L. REF. 255 (1988)

[11] The definition of "Material that is Harmful to Minors" is set out in 47 U.S.C. § 231 (e)(6) and "means any communication…that is obscene or that—(A)…(B)…and (C) [the "*Millerized-Ginsberg* Test" for what is "Obscene For Minors" or "Harmful To Minors", as defined]". (Emphasis added.) (Copy in Appendix.)

497, at 500-01 (1987) ("a reasonable person" would "judge" serious value in prong three, not by "community" standards). In the past thirty years, there has been virtually no need for enforcement of state Harmful To Minors laws, due to universal compliance with HTM sale and display laws by businesses across the Nation. However, obscenity prosecutions and civil challenges to HTM laws provide guidance and authoritative construction precedent for understanding the scope of COPA. It is worth noting that some "men's sophisticate" magazines have been found "obscene" as a matter of law, even for adults, by federal and state courts: *See Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *Penthouse v. Webb*, 594 F.Supp. 1186 (N.D. Ga. 1984); *City of Urbana v. Downing*, 539 N.E.2d 140, 149-50 (Ohio, 1989); *State v. Flynt*, 264 S.E.2d 669, 679 (Ga. App. 1980), *cert. denied*, 449 U.S. 888 (1980); *City of Belleville v. Morgan*, 376 N.E.2d 704 (Ill. App. 1978); *State of Ohio, City of Cleveland v. Hustler Magazine, Inc.*, No. 76-959230, Rec. vol. 330, pp. 545-55 (Ohio Common Pleas, 1976).

Such "men's sophisticate" magazines are well-known and universally treated in the magazine and print medium as "harmful to minors." Consequently, this type of pornography is not displayed to minors in print form and is the type of pornography that would be restricted from open commercial display to minors on the Web under COPA. No court should find that these long-existing HTM laws are misunderstood or unreasonable in the print medium and film industry. This system works in all other media and commercial settings in this Country and COPA would do likewise for commercial porn sellers on the WWWeb.

Though HTM laws have heretofore been state statutes and city ordinances, the standard is familiar to the federal courts, which have routinely upheld such laws. See, for example: *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997) (Calif. statute

requiring adult tokens for HTM soft-porn vending machines); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *American Booksellers Ass'n v. Commonwealth of Virginia*, 882 F.2d 125 (4th Cir. 1989), on remand, 488 U.S. 905 (1988), upholding HTM law as construed on certified questions in *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1988); *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). *See* House REPORT at 13.

During the last four decades, the Harmful to Minors test for what is "Obscene For Minors" has been judicially, publicly, and commercially limited to soft-core pornography that is as unprotected for minors as hard-core pornography is obscene and unprotected even for consenting adults.

COPA's definition of Harmful To Minors, 47 U.S.C. § 231 (e)(6), includes that which is "obscene" for adults, as well as that which is "Obscene For Minors" under the variable obscenity test for what is unprotected for minors.

In adopting a narrowed version of the established test for Harmful To Minors, COPA should be interpreted and construed to narrow its reach to materials that are intentionally pornographic and inappropriate for minor children of the intended and probable age groups to which it is exhibited. As stated in the House REPORT at 28:

> The Committee also notes that the "harmful to minors" standard has been tested and refined for thirty years to limit its reach to materials that are clearly pornographic and inappropriate for minor children of the age groups to which it is directed. Cases such as *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Board of Education v. Pico*, 457 U.S. 853 (1982), prevent the traditional "harmful to minors" test from being extended to entertainment, library, or news materials that merely contain nudity

> or sexual information, regardless of how controversial they may be for their political or sexual viewpoints. [Emphasis added.]

Erznoznik and *Pico* also prevent viewpoint discrimination and suppression of ideas, which are not permitted under the HTM/OFM test. Minors are entitled to sexual information that has serious value for their age groups, even if "someone" might find them offensive or prurient. These cases are binding on all courts with respect to the scope and applicability of state and federal HTM laws, including COPA. They protect Plaintiffs and the public in rejecting unfounded, hypothetical scare tactics of those who would have them believe that such protected speech may be in jeopardy. *Erznoznik*, 422 U.S. at 213, held that "all nudity cannot be deemed obscene even as to minors" and cited *Cohen v. California*, 403 U.S. 15, 20 (1971) ("such expression must be, in some significant way, erotic"). Such statements were repeated in later cases such as *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") and *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("that society may find speech offensive is not a sufficient reason for suppressing it"). *Erznoznik*, 422 U.S. at 213, held an ordinance overbroad because it was "not directed against sexually explicit nudity, nor is it otherwise limited.... Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." [Emphasis added.]

Most reported decisions on the HTM/OFM test are federal court reviews of state harmful to minors display or sales laws and do not involve factual findings as to the

"harmful to minors" nature *vel non* of any particular materials. In a few major decisions, however, there were findings as to certain trial exhibits as to what could be within the reach of those laws and authoritative constructions were offered to provide guidance on the scope of such laws.

American Booksellers v. Webb, supra, 919 F.2d at 1503-05, upholding Georgia's HTM display law and "*Millerized-Ginsberg* Test" and finding that a defendant's exhibit would be subject to the law, stating in footnote 22:

> This is not to say that the statute covers only material already subject to Georgia's general obscenity statute.... For example, Defendant's Exhibit 1, *Human Digest* (June 1984), found in a convenience store with no restrictions on in-store access by minors, would be 'harmful to minors' and thus subject to section 16-12-103's bans on sales to minors and display. The cover refers to several articles within that are written from the juvenile perspective: "'Why My Mom Loves Oral Sex!'"; "'I Made X-Rated Videos for Dad!'"; "'Sex Slave Sis!'"; and "'My Anal Aunt!'".

Upper Midwest Booksellers v. City of Minneapolis, 602 F.Supp. 1361, at 1369 (D. Minn. 1985), upholding city HTM display ordinance and declaring that it was lawfully applicable to "sexually explicit materials" that are "harmful to minors" and stating:

> A child who walks into a store which openly displays material with sexually explicit covers may be harmed simply by viewing those covers.

In affirming that District Court opinion, the Eighth Circuit Court of Appeals in *Upper Midwest Booksellers v. City of Minneapolis, supra*, 780 F.2d at 1395, recognized the limitations and construction of such HTM laws in upholding

the display provision as a valid time, place, and manner protection for minors. The ordinance did not prohibit adults from obtaining "adult" materials, even though adults must comply with the "incidental effect of the permissible regulation" by purchase, requesting of a copy from a clerk, or perusal in "adults only bookstores or in segregated sections of ordinary retail establishments".

In the Virginia Supreme Court's opinion on certified questions from this Court, 484 U.S. 383, the State Court held that each of the 16 works[12] "feared" to be threatened by Virginia's HTM law were not legally "harmful to minors," even though the federal courts had presumed the books were in jeopardy of the law when interpreted in an overly broad fashion. *Commonwealth v. American Booksellers, supra*, 372 S.E.2d at 622:

> The 16 books in question run the gamut, as the Supreme Court aptly put it, from classic literature to pot-boiler novels. Having examined them all, we conclude that although they vary widely in merit, none of them lacks "serious literary, artistic, political or scientific value" for a legitimate minority of older, normal adolescents. It would serve no purpose to review the books in detail. Because none of them meets the third prong of the tripartite test, we hold that none of the books is "harmful to juveniles" within the meaning of [Virginia] Code §§ 18.2-390 and 391.

This recognition that the HTM/OFM test must consider serious value for the age group to which it is directed was an essential and principle holding of the

[12] *i.e.*, "Where Do Babies Come From?," "Ulysses," "The New Our Bodies, Ourselves," "Am I Normal?," "Witches of Eastwick." 372 S.E.2d at 622.

Supreme Court of Virginia, and is another narrowing limitation on COPA. *See also American Booksellers v. Webb, supra*, 919 F.2d at 1504-06, and House REPORT at 28.

These precedents form the basis for COPA's constitutionally valid reach to pornography that is not protected in its display to minors, by those commercial pornsites that can and should comply.

The District Court's interpretation and conclusions of law in this case, 31 F.Supp.2d at 481, 497, are beyond the clear bounds of the binding precedent applicable to COPA's HTM/OFM test and the Third Circuit, 217 F.3d at 173-78, extended the error further in affirming on a narrower, but equally erroneous, ground by misapplying community standards.

The legislative history is clear that the established decisions cited above and in the House Committee REPORT were adopted into COPA[13] and the lower courts erred in failing to so construe the Act. Those decisions mandate and should have guided the courts below in an authoritative construction of this new federal law in such a constitutional manner. This Court should now do so and enter the judgment that was warranted below.

CONCLUSION

Your *amici* submit that the Congressional Committee Report was right and the Third Circuit was wrong on this critical issue and that this Court should reverse this pretrial

[13] House REPORT at 12-13, 27-28. *See also* floor statement by Senator Coats that COPA is intentionally limited by these guiding precedents and that HTM material is the type of sexually explicit pornography that is clearly obscene as to minors and not merely offensive or controversial. Cong. Rec.- Senate, S.12146-54 (daily ed., Nov. 8, 1997).

judgment and correct that error for the proper guidance of the trial court.

The error below:

The Court of Appeals below, at 178, failed to follow established First Amendment obscenity jurisprudence in its conclusions that (1) geographic standards would be inherently unconstitutional in "cyberspace," that (2) obscenity and harmful to minors laws must be inherently applied by geographic standards, and that (3) COPA thus could not be narrowed to avoid that perceived unconstitutionality by following the intent of Congress to customize a new Web-specific test for "harmful to minors" that employs a more uniform American adult- age based standard, rather than a geographic or territorial based viewpoint.

The correct HTM/OFM test:

When COPA is so construed, as intended in the House REPORT and sponsor's statement, the trier of fact may properly arrive at a judgment as to whether certain hard or soft core pornography is "harmful for minors" by applying the viewpoint of the average adult person, applying American adult standards with respect to what is obscene for minors, when taken as a whole, predominantly appeals to a prurient interest in nudity, sex, or excretion with respect to the probable and recipient age group of minors and whether the sexual depictions or descriptions are presented in a patently offensive way with respect to the probable and recipient age group of minors. The final prong is not judged with reference to community standards, but is determined by the more universal judgment of a reasonable person's finding as to whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value for the probable and recipient age group of minors to which it is directed or to whom the distributor knowingly displays the pornography.

The problem created for HTM and obscenity cases:

This Court should correct the fundamental error explicit in the Third Circuit's opinion for the additional reason that such an interpretation of community standards as exclusively territorial would or could be applied erroneously by federal and state courts to the application of adult obscenity laws to Internet or Web cases, despite this Court's recognition in *Jenkins v. Georgia*, 418 U.S. 87, 157 (1974), that geographic standards are not required for testing obscenity and in *Reno v. ACLU*, at 878, n. 44, that:

> Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.

For all these reasons, the judgment of the Court of Appeals in affirming the preliminary injunction should be reversed and a narrowing authoritative construction be adopted by this Court that is binding on the lower courts in order to allow COPA to be applied in a valid and constitutional fashion as intended by the Congress.

Dated: July 27, 2001

Respectfully submitted,

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APPENDIX

APPENDIX

TEXT OF OPERATIVE PROVISIONS OF COPA, THE CHILD ONLINE PROTECTION ACT

Title 47, United States Code

Section 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

(a) REQUIREMENT TO RESTRICT ACCESS.—

(1) PROHIBITED CONDUCT. –Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

* * *

(c) AFFIRMATIVE DEFENSE.—

(1) DEFENSE.—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

* * *

(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

* * *

(2) COMMERCIAL PURPOSES; ENGAGED IN THE BUSINESS.—

(A) COMMERCIAL PURPOSES.—A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) ENGAGED IN THE BUSINESS.—The term `engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful

to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

* * *

(6) MATERIAL THAT IS HARMFUL TO MINORS.--The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) MINOR.—The term `minor' means any person under 17 years of age.

CERTIFICATE OF SERVICE

Three copies of this Brief of Members of Congress as *Amici* Curiae were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, on the 27th day of July, 2001, addressed to:

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